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APPELLANTS' BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 15

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC COMPANY,
UTAH RAILWAY COMPANY,
BAMBERGER RAILROAD COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DIST[redacted] COURT
FOR THE DISTRICT OF UTAH

CALVIN L. RAMPTON
Counsel of Record for Appellants
E. R. CALLISTER,
Attorney General of Utah
RAYMOND W. GEE
Asst. Attorney General
KEITH SOHM
Commerce Attorney for the Utah Public Service Commission
Attorneys for Appellant, Public Service Commission of Utah

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THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

A

OPINIONS IN DISTRICT COURT

This is an appeal from a decision of the United States Court for the District of Utah. The prevailing opinion of Circuit Judge Pickett and Judge Ritter and the dissenting opinion of

Judge Christenson are reported at 146 Fed. Supp. 803 and are reproduced at pages 39 to 65 of the printed record.

B

BASIS OF JURISDICTION

The jurisdiction of this Court is evoked upon the following grounds:

(1) This was an action brought by the appellants for the purpose of annulling and setting aside an Order of the Interstate Commerce Commission under the provisions of Title 49, U.S.C., Section 19 (9) and Title 28 U.S.C. Sections 1366, 1398, 2284, 2321, 2322, 2323, 2324 and 2325 and pursuant to Title 5, U.S.C. Section 1009. The action thus commenced was required by the statutory provisions above quoted to be heard and determined by a District Court of three judges.

(2) Title 28, U.S.C. 1253 covers jurisdiction of this Court to entertain a direct appeal from such final order. Said Title 28, U.S.C. 1253, provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

(3) The matter was heard by a District Court of three judges. Following the trial of the issues the Court, on the 13th day of June, 1956 made its Findings of Fact, Conclusions of Law and Final Decree denying the permanent injunction sought by the appellants and setting aside the interlocutory injunction theretofore entered in the matter. The Findings of Fact, Con-

clusions of Law and Final Decree were filed and entered in the office of the Clerk of the United States Court for the District of Utah on the 18th day of June, 1956. Appellants' notice of appeal to the Supreme Court of the United States was filed with the United States District Court for the District of Utah on the 10th day of July, 1956. Probable jurisdiction was noted on November 5, 1956. The printed record was received by counsel for the appellants on September 9, 1957.

C

STATUTES INVOLVED

This appeal involves the power of the Interstate Commerce Commission to regulate intrastate rates under the provisions of 49 U.S.C.A. 13 (3) (4). These statutory sections read as follows:

> *"Sec. 13, par. (3) Investigation involving State regulations; conference of State and interstate commissions.* Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating

bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter.

"*Sec.* 13, *par.* (4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

D

QUESTIONS FOR REVIEW

The questions presented for review in this appeal are as follows:

(1) Were the findings of the Interstate Commerce Commission challenged in the above entitled case supported by substantial evidence?

(2) May the court sustain the Interstate Commerce Commission's Order, without further evidence on the following:

(a) The presumption that interstate and intrastate rates were in proper relationship prior to the increase.

(b) The matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains.

(3) May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the evidence of the railroads.

(4) May an attack be made in this action upon the legality of the Interstate Commerce Commission Order in Ex Parte No. 175.

E

STATEMENT OF THE CASE

This was an action brought by the Public Service Commission of Utah and the Utah Citizens Rate Association to set aside an order of the Interstate Commerce Commission granting an increase of 15% in Utah intrastate railroad freight rates.

In a proceeding entitled Increased Freight Rates 1951, which will hereinafter be referred to as Ex Parte 175, the Class I railways of the United States made application to the Interstate Commerce Commission for an increase in interstate freight rates and charges. Three separate orders were issued in this proceeding. In the first one the railroads were granted an increase of 2% on all basic interstate rates and charges with certain exceptions. In the second order, the western railroads were authorized to make an additional 4% increase and the eastern roads an additional 7% increase. In the third order, which was dated April 11, 1952, and which is reported at 284

I.C.C. 589, the western roads were granted authority to take an additional 9% and the eastern roads an additional 6%. Thus, the total increase granted to all railroads on interstate rates in Ex Parte 175 was 15%. As pointed out above this 15% increase was subject to certain exceptions and hold-downs, but generally applied to all interstate rates.

In June of 1951 the Class I railways operating within the State of Utah made application to the Public Service Commission of Utah for an increase in intrastate rates in the same percentage as that being sought from the Interstate Commerce Commission on interstate rates in Ex Parte 175. Hearing was had thereon on October 29, 1951 at Salt Lake City, Utah. At the close of the hearing the Public Service Commission of Utah ruled that the railroads had not produced evidence to justify the increase but ordered that the record should be left open for a period of 60 days to allow the railroads to furnish the required evidence. No further evidence was furnished at this time and no final order was entered in the case by the Utah Commission. At the time the second increase was given in interstate rates in Ex Parte 175, the railroads filed a further petition with the Utah Commission. No hearing was ever had on this second petition. Following the final order by the Interstate Commerce Commission in Ex Parte 175, the railroads filed a third petition with the Utah Commission requesting the full increase of 15% on Utah intrastate rates with certain minor exceptions. This third petition was heard fully by the Utah Commission at hearings on the 17th day of November, 1953 and the 11th day of December, 1953. After the case was heard and submitted, the Commission ruled that the railroads had failed to present evidence from which the Commission could determine whether or not the intrastate operation of the applicant railroads produced revenue sufficient to provide a fair share of the overall revenue

requirements of the applicant railroads. This order was made "without prejudice to applicants to apply for further hearing for the presentation of further evidence."

The Public Service Commission of Utah did not and has never refused to authorize the petitioners to increase their intrastate rates and charges if the railroads can produce evidence justifying such increases. No appeal was made to the Supreme Court of Utah from this order of the Public Service Commission of Utah.

Following the hearings before the Public Service Commission of Utah and the order above referred to, the petitioning railroads filed a petition with the Interstate Commerce Commission under the provisions of 49 U.S.C. 13. (3). (4). Pursuant to this petition the Interstate Commerce Commission entered into an investigation of the Utah intrastate rates under I.C.C. Docket No. 31484. All common carrier railroads operating in the State of Utah were made respondents in the proceedings and the Public Service Commission of Utah, the Utah Citizens Rate Association and other shippers within the State of Utah appeared as parties protestant.

Hearings in I.C.C. Docket No. 31484 were conducted at Salt Lake City, Utah on the 20th and 21st days of May, 1954 before Interstate Commerce Commission Examiner Myron Witters. Evidence was presented by the railroads and by the protestants. The complete record of the hearing has been introduced as evidence in this proceeding. This matter was held under consideration by the examiner until the 11th day of March, 1955 when a proposed report and order was served upon the plaintiffs herein. The report and order recommended that the Interstate Commerce Commission should find that the existing Utah intrastate rates and charges were abnormally

low and that traffic thereunder failed to produce its fair share of earnings required to yield the respondent railroads' required revenue, and further that the burden thus cast upon interstate commerce was undue in and to the extent that the intrastate rates and charges were less than those recommended in the report.

The plaintiffs in this action filed exceptions to the examiner's report and argued the same orally. On October 17, 1955 the Interstate Commerce Commission issued a report in Docket No. 31484, which report carried into effect the recommendations of the examiner. Interstate Commerce Commissioner Howard Freas dissented in part from the report. A motion for reconsideration was made and denied and the increased intrastate rates within the state of Utah were, by order of the Interstate Commerce Commission date February 8, 1956, ordered into effect as of the 13th day of March, 1956.

The plaintiffs thereupon filed this action in the United States Court for the District of Utah to set aside the orders of the Interstate Commerce Commission. After hearing, a temporary restraining order was entered holding the matter in abeyance until hearing on the merits of the case. A trial before a three judge court was held on the 9th day of April, 1956. By stipulation of the parties the temporary restraining order was continued in effect pending final decision of the case. On the 13th day of June, 1956 the United States District Court for the District of Utah denied the permanent injunction and set aside the temporary restraining order. Judge Christenson dissented. This appeal is taken from the action of the United States District Court.

EVIDENCE BEFORE THE INTERSTATE COMMERCE COMMISSION

The record of the hearing before the Interstate Commerce Commission was introduced in the United States District Court as Exhibits 2 and 2A (R. 88, 138-748). These exhibits consisted of the transcript of the testimony and 80 exhibits presented before the Interstate Commerce Commission, which are reproduced in full in the printed record. Hereafter in this brief in making reference to exhibit numbers, counsel will refer to the exhibit number before the Interstate Commerce Commission. The exhibits are identified by those numbers in the printed record.

THE RAILROADS' EVIDENCE

The railroads called as a witness Mr. Herman Kroll (R. 140), a statistician with the Western Traffic Association. Mr. Kroll testified generally about economic trends in Utah and the Western states generally and also testified regarding the systemwide revenue needs of the five principal class I railways operating in and through the state of Utah. Mr. Kroll introduced exhibits 1 (R. 153, 419-426) and 2 (R. 153, 426-433). Exhibit 1 deals with the improved economic conditions in the west and the state of Utah. Exhibit 2 shows statistics on a composite basis systemwide for the Denver & Rio Grande Western, Southern Pacific, Union Pacific, Utah, and Western Pacific railroads. It also contains certain price indexes on railroad supplies. Nowhere did Mr. Kroll break down the operating figures of any roads between intrastate and interstate operations. He testified that such a breakdown was impossible to make. He further testified (R. 143) that the average revenue per ton mile for railroads within the state of Utah was lower than

the national average or the average of the western states. However, he admitted on cross-examination (R. 366) that traffic in the state of Utah is much more heavily weighted percentage wise in favor of low cost, low revenue products of the mines than is the case either nationally or in the western district. Mr. Kroll testified that assuming no diversion of traffic a 15% increase in Utah intrastate rates would result in additional revenue to the railroads of $1,870,000 per year (R. 163).

Mr. G. M. Watson, freight traffic manager of the Union Pacific Railroad was called as a witness (R. 167) and introduced Exhibits 3, 4, and 5 (R. 190, 434-450) showing a history of Utah intrastate increases. He also introduced Exhibits 6 to 36 (R. 190, 451-500) inclusive, these exhibits being maps and tables showing movements of various commodities both intrastate within the state of Utah and interstate where Utah was either the point of origin or destination. Mr. Watson testified on cross-examination (R. 207) that the only purpose of these exhibits was to show that there was actually freight being moved under the rates which they propose to increase, and not to show any comparison between interstate and intrastate rates.

Mr. Waldo A. Gillette, an officer of Monolith Portland Midwest Company, a cement producer at Laramie, Wyoming, was called (R. 218) and testified in regard to preferences resulting to intrastate shippers over interstate shippers as a result of the Utah Commission's refusal to increase Utah intrastate rates. The Interstate Commerce Commission held, however, that the railroads failed to establish preference within the terms of 49 U.S.C.A. 13 (4). The testimony of Mr. Gillette, therefore, is not relevant to this appeal.

The railroads called as witnesses Mr. Herman S. Jensen

(R. 242), an operating man from the Union Pacific Railroad and Mr. R. K. Bradford (R. 317), Vice President of Denver & Rio Grande Western railroad, both of whom testified to the effect that the railroads handle interstate and intrastate traffic without distinction intermingling it on the same trains and handling it with the same crews.

Mr. T. K. Early (R. 248) testified generally regarding the movement of coal by the Denver & Rio Grande Railroad and gave some testimony in regard to coal rates.

THE PROTESTANTS' EVIDENCE

Mr. Robert Crandall, a statistician for the Public Service Commission of Utah, introduced three exhibits. Exhibit No. 64 (R. 311, 548) compares operating ratios and ton miles per mile of track within the state of Utah and for the systems as a whole of Denver & Rio Grande, Southern Pacific, Union Pacific and Western Pacific. In each instance the operating ratios are lower and the density figures higher within the state of Utah than for the systemwide operation of the lines in question. Exhibit No. 65 (R. 311, 549) shows statistics for the Denver & Rio Grande Western Railroad comparing the State of Utah, State of Colorado and the system as a whole for various railroad operating indexes. Exhibit No. 66 (R. 311, 550) shows comparative revenue per ton mile on Utah intrastate traffic and interstate traffic originating in Utah as follows:

Products	Revenue Per ton-mile	
	Intrastate Cents	Interstate Cents
Agriculture	2.57	1.14
Animals	4.15	2.71
Mines	1.06	.74
Manufactured Miscellaneous	3.63	1.52
Total of all Products	1.21	1.06

Mr. H. E. Colwell (R. 368), traffic manager for the Utah Citizens Rate Association, introduced two exhibits. Exhibit No. 74 (R. 375, 735) shows rates on steel intrastate within Utah from Geneva to Salt Lake City as compared with rates from Kaiser, California to Los Angeles, California and Pittsburgh, California to San Francisco, California. The Utah mileage is somewhat shorter than the California mileages and yet the Utah rates, without the 15% increase, are substantially higher than are the California rates, including the 15% increase. Exhibit No. 75 (R. 375, 736-738) compares Utah intrastate rates on selective commodities with interstate rates on the same commodities for comparable mileage. This exhibit generally shows that on the commodities selected, which the witness stated were typical, (R. 372) the Utah intrastate rates are higher without the increase than are the interstate rates including such increase.

Mr. T. E. Thain (R. 376), accountant for the Utah Public Service Commission introduced Exhibit No. 76 (R. 378, 739) which shows that in the year 1953 Bamberger Railroad Company, one of the petitioning railroads which operates entirely within the state of Utah, showed a rate of return of 15.98%.

Mr. H. L. Balser (R. 353), President of Bamberger Railroad Company, subpoenaed by the protestants, testified that although Bamberger Railroad carried by interline a great deal of interstate freight its division of revenue on this interstate rate is based upon its intrastate rates as a maximum (R. 356).

Mr. Miles P. Romney (R. 383) of the Utah Mining Association, Mr. B. P. Banley (R. 323) of the Utah Coal Producers Association and Mr. T. C. Taylor (R. 400), Traffic Manager of Ideal Cement Company, testified regarding railroad rates as affecting their particular commodities.

SUMMARY OF ARGUMENT

I

Before the Interstate Commerce Commission has jurisdiction to prescribe an intrastate rate, the basis of that jurisdiction, as set out in 49 U.S.C. 13 (4), must clearly appear from the record.

II

The Interstate Commerce Commission can take jurisdiction of intrastate rates only if:

A. Intrastate rates are so low as to cause undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand; or

B. Intrastate rates are so low as to place an undue, unreasonable or unjust financial burden on interstate commerce.

III

The Interstate Commerce Commission found that the railroads did not introduce evidence sufficient to establish discrimination as between interstate and intrastate shippers. Therefore, the jurisdiction of the Interstate Commerce Commission, if it is to be established, must rest upon a showing that intrastate rates are so low that they fail to contribute their fair share to the over-all earnings requirements of the railroads, and therefore throw an undue burden on interstate traffic.

IV

The railroads could establish, if such were the case, that intrastate rates are so low as to cast a burden upon interstate commerce in either one of two ways:

A. They may show intrastate earnings, intrastate expenses and intrastate investment for the purpose of developing an intrastate rate of return. This the railroads did not attempt to do in this case and maintain that they cannot do.

B. They may establish an overall need for additional revenues on the part of the roads and then establish, if such be the case, that "conditions under which interstate and intrastate traffic move are * * * * * substantially the same with respect to all factors bearing upon the reasonableness of the rate." *

V

The railroads did not introduce evidence that conditions under which interstate and intrastate traffic move are substantially the same with respect to all factors bearing upon the reasonableness of the rate in the following particulars:

A. The railroads introduced no comparative rate studies, with two minor exceptions, to show that intrastate rates are not already as high on a comparable basis without the 15% increase as are interstate rates after the imposition of the 15% increase.

B. The railroads introduced no evidence of comparative cost of handling intrastate and interstate shipments

* Illinois Commerce Commission v. United States, 292 U.S. 474; 78 L ed. 1371.

of like character for like distances and in particular, introduced no evidence on comparative densities of traffic interstate and intrastate, which is of vital importance in determining costs.

VI

The Interstate Commerce Commission and the Court below ignored the substantial evidence of protestants establishing:

A. Utah intrastate rates are for the most part as high or higher without the 15% increase as are interstate rates including the 15% increase.

B. The railroads' per unit cost of handling traffic within the state of Utah is considerably lower than systemwide for the roads serving Utah, principally because of the much higher density of traffic within the state of Utah.

C. The operating ratios of the railroads within the state of Utah are substantially lower than the operating ratios of the same roads systemwide.

VII

The only evidence introduced by the railroads as to the similarity of conditions affecting interstate and intrastate rates is evidence to the effect that railroads handle interstate and intrastate shipments indiscriminately on the same cars, over the same rails and through the same terminals, which evidence is insufficient to establish substantial similarity of conditions for the following reasons:

A. It ignores any difference in rates which might have existed in interstate and intrastate rates prior

to the time the percentage increase was applied to either.

B. It ignores the difference in costs of handling interstate shipments based upon differences in density of traffic.

VIII

If the evidence as introduced by the railroads in this case is sufficient to establish jurisdiction of the Interstate Commerce Commission over intrastate rates, then the Interstate Commerce Commission automatically has jurisdiction over intrastate rates in all cases and there is no need for any hearings before the Interstate Commerce Commission under the provisions of 49 U.S.C.A. 13 (3) (4). The jurisdiction of the Interstate Commerce Commission would be complete—assuming the railroads' position here—upon the following reasoning:

A. The Interstate Commerce Commission has already decided in an ex parte interstate case that the railroads need additional overall revenue.

B. The Commission and the courts can take judicial notice of the fact of common knowledge that railroads intermingle interstate and intrastate shipments, which fact establishes that all facilities bearing upon the reasonableness of interstate and intrastate rates are substantially the same.

C. Therefore, whenever the Interstate Commerce Commission finds interstate rates must be increased, the finding automatically applies to intrastate rates, and the jurisdiction of the Interstate Commerce Commission attaches.

IX

The increase, as established in Ex Parte No. 175 for interstate rates was itself illegal and unlawful and, therefore, should not be used as a measuring stick for increasing intrastate rates. The protestants should be permitted to raise this point in these proceedings and the court below was in error in holding that such constituted a collateral attack on the Ex Parte No. 175 order.

G

ARGUMENT

The plaintiffs do not question the power of the Interstate Commerce Commission to take jurisdiction of intrastate rates under proper circumstances. It is obvious that where both interstate and intrastate shipments are handled by the same railroads, both types of traffic must contribute a fair share to the over-all revenue needs. The federal government under its power to regulate interstate commerce has an inherent power under the commerce clause of the Constitution to prevent intrastate rates from being so low as to place a burden on interstate commerce. This power was recognized by the courts before it was enacted into law by the Congress.

In the case of Houston E. & W.T. Railroad Co. v. United States, 234 U.S. 242, 58 L. ed. 1541, the Court held that where intrastate rates place a burden on interstate commerce or discriminate against persons in interstate commerce there is an inherent power in the federal government to take jurisdiction. Sub-sections (3) and (4) of Section 13 of the Interstate Commerce Act were enacted the year following the decision in the Houston case and are a mere codification of the principles there set forth. However, the courts have been uniform in their

holdings that where federal agencies attempt to interfere in intrastate matters, all elements which form the basis of federal jurisdiction must appear clearly, and any doubts must be resolved against federal regulation in favor of state regulation. Here, the Interstate Commerce Commission is being asked to raise intrastate rates in a circumstance where the Utah law would not permit them to be raised.

In the case of Davies Warehouse Co. v. Bowles, 321 U.S. 144, 88 L. ed. 635, this Court in considering a matter where an attempt was being made to extend a federal regulation to certain matters in contravention of a state statute, stated:

> "It also is contended that an interpretation must prevail as a matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law. It is, of course, true that uniform operation of a federal law is a desirable end and, other things being equal, we often have interpreted statutes to achieve it. But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the federal government."

In interpreting the power of the Interstate Commerce Commission to interfere in intrastate matters, this Court time and again has reiterated the principle that this power should be exercised with extreme caution and should be exercised only where every element of federal jurisdiction appears clearly of record. In the case of Palmer v. Massachusetts, 308 U.S. 78, 84 L. ed. 93, the Court stated:

> "To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its inter-

state phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 LRA (NS) 1151, Ann Cas. 1916A, 18; cf. Kelly v. Washington, 302 U.S. 1, 82 L. ed. 3, 58 S. Ct. 87."

This principle has been reiterated in other cases. See Yonkers v. United States, 320 U.S. 685; 88 L. ed. 400; Alabama Public Service Commission v. Southern Ry., 341 U.S. 341, 95 L. ed. 1002, and Arkansas R.R. Commission v. Chicago, Rock Island and Pac. R.R. Co., 274 U.S. 597, 71 L. ed. 1224.

In the case of North Carolina v. United States, 325 U.S. 507, 89 L. ed. 1760, passing upon this point the Court said:

"Intrastate transportation is primarily the concern of the states. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. American Express Company v. South Dakota, 244 U.S. 617, 61 L. ed. 1352. A scrupulous regard for maintaining the power of the State in this field has caused this court to require that the Interstate Commerce Commission's orders giving precedence to Federal rates must meet 'a high standard of certainty'. Illinois Central Railroad v. State Public Utilities Commission, 245 U.S. 493, 62 L. ed 425. Before the Commission can nullify a state rate, jurisdiction for the 'exercise of Federal power must clearly appear.' Florida v. U.S. 282 U.S. 194, 75 L. ed. 291."

Turning to the case now before the Court, the federal jurisdiction may be exercised in this case if, but only if, one of two conditions prevails: (1) the Utah intrastate rates are so low as to discriminate against persons in interstate commerce; or (2) the Utah intrastate rates are so low that they place an undue burden on interstate commerce because of their failure to yield a fair share of the overall earnings requirements of the railroads. The Interstate Commerce Commission determined that the first ground of jurisdiction did not exist. We are concerned, therefore, only with the second. In order for the Interstate Commerce Commission to exercise jurisdiction in this case, it must appear clearly from the record that the net earnings from the railroads within the State of Utah are deficient. In order to establish this, there has got to be evidence on both sides of the picture: first, the gross revenue yielded by the rates; and secondly, the cost of rendering the service. This principle is clearly spelled out in the case of North Carolina v. the United States, 325, U.S. 507, 89 L. ed. 1760. It cannot be proved by evidence on one side of the picture only. Lower intrastate rates might be justified by lower intrastate costs. Likewise, a mere showing of higher intrastate costs would not prove anything unless the revenues were also shown.

In order for the Interstate Commerce Commission's order to be valid, it must contain a general finding to the effect that the Utah intrastate rates cast an undue burden on interstate commerce, and it must contain subsidiary findings in support of the general findings. Further, all of the findings must be supported by substantial evidence. We do not quarrel with the sufficiency of the general findings as written in the report. The Interstate Commerce Commission has complied with the requirements of the case of King v. United States, 344 U.S. 254, 97 L. ed. 301 in this regard. In fact the approved findings

in the King case have been copied almost verbatim. We do maintain, however, that there is not substantial evidence, in fact we say that there is no evidence upon which the findings could be based, and there we say the report and order is fatally defective.

The railroads could prove, if such were the case, that intrastate rates were so low as to cast a burden upon interstate commerce in either one of two ways. The most direct way would be to introduce evidence as to intrastate revenues within the state of Utah, the costs incident to earning such revenues and an allocation of their property investment to intrastate service. The railroads did not do this and take the position that they cannot do it. Under the holding in the King v. United States, 344 U.S. 254; 97 L. ed. 301, the railroads may make their proof if they can show first, that they are in need of revenues overall on their system, and secondly, that the conditions under which interstate and intrastate traffic move are substantially the same as to all factors bearing on the reasonableness of the rates.

The rule in the King case is in effect syllogistic reasoning.

A. Overall railroad rates should be increased.

B. All factors affecting the reasonableness of intrastate rates are the same as those affecting all other rates.

C. Therefore, intrastate rates should be increased.

However, as in all syllogisms, if either premise is not true, the conclusion does not follow. We agree that the railroads did introduce evidence from which the Commission might have found a need for overall revenue. We maintain that they introduced no evidence from which could be found the same

ness of conditions required under the second point. The railroads have not proved the minor premise. That they have the burden of proof in this matter is beyond dispute; and since they have to make their proof, the jurisdiction of the Interstate Commerce Commission should not exist.

It is obvious from the evidence introduced by the railroads in this case, and by the arguments of counsel in the courts below, that the defendants feel that the necessity of increased rates, both intrastate and interstate, was established in Ex Parte 175 and that the increase of intrastate rates should be a mere formality. This fact was commented upon by the Court in Mississippi Public Service Commission v. United States of America and Interstate Commerce Commission, 124 Fed. Supp. 809, Motion to Affirm granted 349 U.S. 908; 99 L. ed. 1244 in the following language:

> "The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. This will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low, but were bearing a fair percentage of revenue for the operation of the carriers."

The same matter was commented upon by Judge Christen-

son in his dissenting opinion in the court below in this case as follows:

> "In reading the transcript before the Interstate Commerce Commission one may detect impatience on the part of some of the witnesses espousing the increase at any suggestion that they were called upon to produce a quantum of proof going to anything beyond an intimate connection between interstate and intrastate traffic in Utah and the difference in rates without the application of the 15% increase to intrastate traffic. In the argument before this court the thesis was pursued that on the basis of common knowledge as to conditions in every state in the Union it could be said that all factors influencing rates were the same, and it was intimated that without evidence these matters of common knowledge would themselves justify the application of similar increases to the two classes of traffic: I fear that this is where the order of the Interstate Commerce Commission is leading us; that, henceforth, if such orders be approved now that the problem has been squarely raised (as it does not appear to have been before) there will be no use for hearings before either the state commissions or the Interstate Commerce Commission with regard to intrastate rates, except as a mere formality in approval of nation-wide increases."

THE EVIDENCE

Similarity of Conditions Affecting Interstate and Intrastate Traffic

The railroads should have had the burden of proof in the proceedings before the Interstate Commerce Commission. They failed to bear this burden. The protestants, although they should not have had to bear the burden of proof, picked up this burden only to have their evidence ignored or minimized by the commission in its report.

The sole evidence of the railroads going to establish the similarity of conditions under which interstate and intrastate traffic move as required by the King case was the testimony of several of the witnesses, i.e., Jensen and Bradford, to the effect that the railroads intermingle interstate traffic without distinction, carrying it on the same tracks, over the same rails and through the same terminals. This is a matter that scarcely needed evidence. It is a matter of common knowledge and known to anyone who has even a superficial acquaintance with the railroads' operations. It is a matter of which the Interstate Commerce Commission has often taken notice and of which the courts can well take judicial notice. However, it certainly cannot be held that such evidence establishes that all factors which bear on the reasonableness of the rates are substantially the same.

In commenting upon this Judge Christenson in his dissenting opinion in the court below stated:

> "The prevailing opinion places stress upon the evidence that there is no discrimination in the handling of intrastate and interstate freight shipments, since they are both handled on the same trains, by the same crews, and by the same departments and it is stated that 'under such conditions, the contention of the plaintiffs has been rejected by the courts.' I cannot find that any court has gone to the extent of holding that such common treatment furnishes a basis of applying intrastate rate increases in the absence of evidence showing similar conditions with reference to all factors affecting rates.
>
> "It is true that Mr. Kroll testified on behalf of the railroads that no distinction is made between the two types of traffic; that traffic is intermingled as between interstate and intrastate; that the same crews, the same clerks, and the same trains haul interstate and intrastate traffic; and that intrastate shipments

and interstate shipments move under 'identically the same conditions'. If an intrastate case can be made on such general testimony, largely within common knowledge, a hearing should not be necessary. Yet as far as the similarity of conditions affecting costs (as distinguished from actual rates charged without reference to cost) is concerned, this seems typical of testimony on which reliance must be placed if the order is upheld."

Comparison of Existing Rates

The railroads presented no comprehensive rate study to show that Utah intrastate rates without the 15% increase are lower than interstate rates including the increase. The witness Watson itnroduced Exhibits 6 to 36 (R. 190, 451-500) which on cursory examination appear to be comparative rate studies. These exhibits show intrastate movements on certain commodities as well as interstate movements and show the revenue per carload unit realized on each of these movements. For the most part the mileage on the interstate examples which he uses are so long and the mileage on the interstate shipments are so short that they afford little basis of comparison. In those few instances where the mileages are comparable, it was developed by counsel on cross-examination of Watson (R. 206) that in almost every instance the intrastate rates were already higher without the increase than were the interstate rates with the increase. Watson then took the position that his exhibits were not intended as comparative rate studies, but were merely introduced for the purpose of showing that there was traffic moving under Utah intrastate rates which would yield additional revenue if the rates were increased. This cross-examination is found at pages 206 and 207 of the record as follows:

Q. I will restate it. I will get at it another way. Your exhibit doesn't purport to show, and doesn't show, that any particular intrastate movement of traffic in the State of Utah is currently paying a lower rate than a comparable interstate shipment moving a comparable distance?

A. That is a very broad statement and I can't testify or answer you unless you want to make it a specific point to point rate. There are hundreds of rates in these exhibits, and I can't attempt to justify an intrastate rate or an interstate rate. All I am trying to bring out here is that Utah traffic is not paying the 15 percent increase and therefore it shows preference to the Utah shippers in preference to the interstate shippers.

Q. We all knew before we came to this hearing didn't we that Utah wasn't paying the 15 percent on intrastate shipments, there isn't a person in this room that was in doubt on that, was there?

A. Well I don't think there was.

Q. Well then, why - - -

A. I think we have been before the Utah Commission with petitions on several occasions that shouldn't be any doubt, there wasn't any doubt in my mind about it.

Q. The only thing you claim for these four pages of paper that you have put in here is to establish what we already knew that Utah wasn't paying the 15% on intrastate shipments, isn't that correct?

A. That is right. These exhibits - - - -

Mr. Rampton: All right.

Mr. Fitzpatrick: Just a minute now. All right, that is all. I will have some questions on redirect.

A. I thought that question was directed to me, I would like to answer it.

Mr. Fitzpatrick: Go ahead. Complete your answer.

A. He stated our position, that is all there is to it, that is the reason we are here."

The railroad witness Early gave some examples of comparative interstate and intrastate coal rates on which the interstate rates are higher, which figures were picked up and included by the Commission in its report (R. 101). The Commission, however, ignored the exhibits of the witness Manley (Ex. 68, 69, 70, 71, 72 and 73. R. 352, 729-734), which showed examples quite to the contraty.

The Commission found on the basis of exhibit 37 (R. 113, R. 501) that certain interstate class rates are higher than intrastate rates at comparable mileages. However, the Commission had to find also that these interstate class rates are mere paper rates moving little traffic as this type of traffic moves interstate on special merchandise rates which are materially lower than the intrastate class rates on which such shipments must move intrastate (R. 113, 114).

The witness Colwell introduced evidence showing that Utah intrastate steel rates are already materially higher than comparable rates on other portions of the system of the Southern Pacific Railroad (Ex. 74, R. 375, 735). He introduced exhibits to show that rates on LCL shipments from Salt Lake City to places within the state of Utah were already higher than shipments for comparable distances from Salt Lake City to points outside the state of Utah (Ex. 75, R. 375, 736-738). He further testified that these rates were typical (R. 372).

The railroads did not bear their burden of proof that Utah intrastate rates are lower than interstate rates, except in the cases of a few isolated rates on coal and some paper class rates. In fact, the railroads' own evidence, which was put in

through the witness Watson, establishes quite the contrary, and the evidence of the protestants established clearly that by and large intrastate rates, before the 15% increase was applied, already were higher than comparable interstate rates which had the increase.

It may be well here to comment upon a device adopted by the Interstate Commerce Commission in its order in an attempt to meet this objection of the protestants. This order provides (R. 119) that no increase shall be taken on an intrastate rate which will raise it to "levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same railroads." This reads well, but it is an illusory protection. Most of the traffic in the west moves on what are known as commodity rates which are not based upon mileage, but which are merely flat rates for a given commodity, in a given weight, from a given point of origin to a given destination. It is on but a rare occasion therefore, that it is possible to find an intrastate rate and an interstate rate which are comparable and to which the above test could be applied. This can be seen from an examination of the exhibits of the witness Watson referred to above. In only some six instances among the many hundreds of rates which he sets forth in these exhibits is it possible to find intrastate rates and interstate rates on like commodities for comparable distances. The "protective" clause in the Interstate Commerce Commission Order, therefore, means nothing so far as a hold down on intrastate rates is concerned.

Comparative Costs

Even if the railroads had proved, which as we pointed out above they did not—in fact the evidence is quite to the con-

trary—that intrastate rates were lower than comparable interstate rates, such would not be sufficient, standing alone, as an evidentiary base for their ultimate findings. This court stated, in the case of Florida v. United States, 282 U.S. 194, page 211, 75 L. ed. 291 at page 302:

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on interstate and intrastate traffic does not warrant the Commission in prescribing intrastate rates."

This holding was cited with approval in the case of North Carolina v. United States, 325 U.S. 507, 89 L. ed. 1760 at page 1768. The evidence must also establish that the elements affecting costs of service are as favorable or more favorable in regard to intrastate commerce as in regard to interstate commerce. We must look at both sides of the ledger.

The railroad evidence is even more wanting, if possible, in regard to comparative costs than it is in regard to comparative rates. The prevailing opinion in the court below makes the statement "the cost of handling intrastate shipments was found to be as great if not greater than the handling if interstate freight." If by this statement the majority opinion was implying that the Interstate Commerce Commission had an evidentiary basis for so finding, it can only be concluded that the record was not carefully examined by the judges who concurred in this opinion. Counsel for the appellants represents to this court that no such evidence exists. Judge Christenson who dissented and whose dissent indicates a careful perusal of the record, states in regard to this contention:

> "The evidentiary basis in the record of the statement that a positive showing was made that the average unit expense of servicing Utah intrastate traffic

is at least as great as that of servicing interstate traffic to and from Utah, cannot be found in the transcript, nor can I find it referred to in the briefs of the respondents. The record seems devoid of a comparison of conditions bearing on the reasonableness of rates, except for such common factors as were held in the first North Carolina case to be insufficient in the findings to support an order. It does not seem enough for the Commission to point to evidence of admitted differences in relevant factors and to say that the differences are not as great as those opposing the increases claim, without some basis in the record upon which to premise a finding that the differences are not substantial."

The protestants, on the other hand, introduced positive evidence to the effect that factors affecting costs of the railroads were much more favorable to lower costs on Utah intrastate traffic than on traffic of the roads on their system as a whole. One of the most important factors affecting the per unit cost of handling freight is the matter of density of traffic. The greater the density, other things being equal, the lower the per ton mile cost. This results from the fact that railroad costs of operation can be broken down into the categories of fixed costs and variable costs. Variable costs vary directly with the amount of freight handled and the distances handled, and, therefore, variable costs will bear equally upon all ton miles of freight handled regardless of density. On the other hand total fixed costs do not change materially with the volume of freight handled and, therefore, as the volume goes up these fixed costs bear less heavily on each unit handled.

Exhibit 64 introduced by the witness Crandall (R. 311, 548) is a comparative density study for Denver & Rio Grande, Southern Pacific, Union Pacific and Western Pacific railroads. Density of traffic in terms of ton miles per main-line mile

of track is compared system-wide for these roads with the state of Utah alone and shows that in the case of all four of these roads for the years 1950 through 1953, the density of traffic was materially higher within the state of Utah than on a system-wide basis. These studies were prepared from annual reports of the railroads on file with the Public Service Commission of Utah. The Interstate Commerce Commission attempts to minimize the effect of this density study on the grounds that it is based upon miles of main-line track and not upon miles of main-line plus branch lines. This is not a valid criticism of the exhibit and does not affect its value as a comparative study. Main-line mileage was used for both Utah density and system-wide density. Had total mileage been used, it would have reduced the density figures in both instances, but would have reduced them in approximately the same proportions, and so would not change the comparative relationship. In commenting upon the Interstate Commerce Commission's belittling of these figures, Judge Christenson, in his dissenting opinion stated:

> "The fact that in arriving at density figures combination main-line and branch-line track was not considered, does not seem to render the data insignificant, since the comparison was based upon main-line track nationally as well as locally. No facts appear which make the conclusion rational that the density figures would, on any theory, represent a factor having no substantial bearing on the reasonableness of the respective rates. It does not seem enough to say that the substantial effect was not as great as if both main-line and branch-line figures had been presented, or to ignore the effect because of vague "average unit expense" figures, neither qualitatively nor quantitively compared therewith."

Comparative Operating Data

As has been stated above, the railroads introduced no evidence at all breaking down operating figures between interstate and intrastate commerce. Counsel for the railroads maintained that it could not be done. While counsel for the appellants do not agree with this position, we do agree, as above stated, that the fact that the railroads did not do this does not mean that they could not make a case if they were able to make it on another basis.

However, the protestants did introduce comparative operating statistics. The railroads are required to submit to the state commissions reports of their operating figures broken down as to states. From the report made to the Utah Public Service Commission by the railroads, the witness Crandall prepared the operating ratio figures as shown on Exhibit No. 64 (R. 311, 548). Operating ratio is merely the percentage relationship of costs to revenue and therefore, the lower the operating ratio, the better the profit position of the railroad. Exhibit 64 shows that the operating ratios of Denver & Rio Grande, Southern Pacific, Union Pacific and Western Pacific within the state of Utah were materially lower than their system-wide operating ratios for the years 1950, 1951, 1952 and 1953. The Interstate Commerce Commission in its report, while taking cognizance of these figures, attempts to minimize their effect by stating that the railroads object to the formula by which the break-down is made. While this may be true, they are the railroads' own figures and represent the best evidence available as to the break-down of revenues and costs between the various states.

Exhibit 76 introduced by the witness Thain (R. 378, 739) is a rate of return study of Bamberger Railroad Co. which oper-

ates entirely within the state of Utah. Rate of return is the percentage relationship of net profit on an annual basis to the investment of the railroads in transportation property. Therefore, the higher the operating ratio the better the profit position of the railroad. In the year 1953, Bamberger Railroad Co. had a rate of return of 15.98% which is more than double the rate of return of any of the defendant railroads which operate in interstate commerce. The railroads attempted to meet this evidence by showing that Bamberger handled not only intrastate traffic, but also interstate traffic on an interline basis. Protestants then subpoenaed the witness Balser, president of Bamberger Railroad Co., who testified that Bamberger's division of revenue on interstate shipments was based upon its intrastate rates as a maximum. Therefore, Bamberger's revenue was exactly what it would have been had every ton of freight it handled been intrastate. The Interstate Commerce Commission in its report, while taking cognizance of this exhibit attempted to minimize its importance by saying that Bamberger was a small road having no passenger deficit to contend with. Certainly, it cannot be contended that the passenger deficit on the interstate roads is sufficient to cut their rates of return in two.

Another interesting comparison is found from the railroads' own exhibits. Southern Pacific Railroad which has only a minute percentage of its operations in the state of Utah showed a rate of return for 1953 of 3.48% (R. 364). Union Pacific which has a somewhat greater percentage of its operations in Utah intrastate service showed a rate of return of 3.56% (R. 363), while Denver & Rio Grande, approximately 50% of whose operations are within the state of Utah showed a rate of return of 6.06% (R. 364). As the percentage of the rail-

roads' business within the state of Utah increases, the rate of return of the roads tends to be higher.

The railroads' evidence is totally lacking in anything which would indicate that cost factors affecting intrastate traffic in Utah are not more favorable than those for the railroads systemwide. The evidence of the protestants on the other hand clearly establishes that cost factors within the state of Utah are considerably more favorable from the railroads' standpoint than are their cost factors systemwide.

Comparative Economic Conditions

The witness Kroll, through his testimony and by Exhibit 1 (R. 163, 419-425) shows that in recent years economic conditions in the west and in Utah particularly have improved to a greater degree than in the nation as a whole. With this position the appellants do not quarrel. However, we maintain it has no materiality in a Section 13 case. It was no doubt introduced for the purpose of establishing that the Utah economy would be able to stand the increased rates. However, the fact that Utah might be able to pay the increased rates on intrastate traffic has no influence upon whether or not the Interstate Commerce Commission could take jurisdiction of these rates in a Section 13 case.

In a purely interstate case where the Interstate Commerce Commission has primary jurisdiction, it is quite common for the Commission to shift the burden of rates according to ability to pay, requiring certain high yield commodities to pay more than their fair portion of the required revenue to compensate for the fact that certain low grade commodities cannot bear their full portion of the operating cost of the road. In a Section 13 case, however, such power does not exist. The

Interstate Commerce Commission can take jurisdiction only if the Utah rates are not bearing their fair share of the burden and so placing a burden upon interstate commerce. The Interstate Commerce Commission cannot say, "The Utah intrastate rates are bearing their fair share of the railroads' revenue burden, but because of a favorable economy, Utah shippers can pay more than their fair share, therefore, we will take jurisdiction, and require them to pay more."

These economic studies of the witness Kroll, together with the history of rates within the state of Utah as shown in Exhibits 3, 4 and 5 (R. 190, 434-450) by witness Watson, explain why Utah rates are currently yielding more than their fair share of the railroads' revenue requirements even without the 15% increase. The basic Utah intrastate rates were established many years ago when Utah's economy was largely agricultural and when traffic density was low. High rates therefore had to be imposed to compensate for the low density. Succeeding horizontal percentage increases down through Ex Parte No. 168 tended further to distort the difference rather than to bring Utah rates down into line with interstate rates. At the same time, Utah was changing from an agricultural to an industrial economy and the density of the traffic was increasing until, as shown by Exhibit 64 (R. 311, 548) it was not lower, but considerably higher than systemwide density. Nevertheless, the old high rates, made still higher by past horizontal percentage increases, still remained in effect, and the railroads by the Ex Parte No. 175 increases are attempting to still further distort them. This matter was commented upon by Judge Christenson in his dissenting opinion as follows:

> "That economic conditions in Utah as of 1950 have improved greatly over the preceding period seems to have no determinative effect on a Section 13 case, since

it is not the ability of intrastate traffic to pay more than its fair share that is involved, but whether the intrastate rate is so low as to be an economic burden on interstate commerce. Furthermore, there seems much force to the plaintiffs' argument that Utah's present economic status, if anything militates against the Commission's conclusion since it suggests that in past years, while Utah's traffic has been essentially agricultural and relatively unproductive of revenue, its rates have moved up as a result of increases corresponding to nation-wide increases, and that now its economy has changed to predominantly mining and industry, the relative productivity of the traffic to the railroads would make the recent nation-wide increases fairly inapplicable intrastate. Be this as it may, and conceding that evidence of general economic conditions locally may be helpful on other phases of a rate case, they do not tend to show that all factors affecting rates are substantially the same as between interstate and intrastate commerce for the purpose of the doctrine announced in *Illinois*."

The Ex Parte 175 Increases as a Measuring Stick

It is the position of the plaintiffs in this case that the interstate rates which the Commission is attempting to use as a standard for increasing intrastate rates are themselves unlawful. It is their position that the order in Ex Parte No. 175 was in direct violation of certain provisions of the Interstate Commerce Act.

The court below refused to consider this point stating that the plaintiffs below, appellants here, were making a collateral attack on Ex Parte No. 175. We agree with the general principle that the decisions of the Interstate Commerce Commission are not open to collateral attack, however, we believe that this is not a collateral attack. We are not here attempting to set aside the interstate increases as authorized in

Ex Parte 175. That case was without doubt res adjudicata as to the interstate rates. However, when the Interstate Commerce Commission attempts to use its findings in Ex Parte No. 175 as a measuring stick in this case they can be no more than stare decisis and we are entitled to attack the logic and the legality of that order as it applies to these proceedings.

We represent to the Court that the decision in Ex Parte No. 175 violates the Interstate Commerce Act in the following particulars:

(a) Title 49 U.S.C.A. 15a (2) provides as follows:

> "(2) Rates to permit carriers to earn fair return. In the exercise of its powers to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, *under honest, efficient and economical management* and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different portions of the country." (Italics added)

Neither in Ex Parte 175 nor in any of the other ex parte horizontal percentage increase cases have the railroads presented or has the Interstate Commerce Commission required any evidence as to the efficiency and economy of the management of the roads. Such situation has merely been presumed to exist.

(b) Title 49, U.S.C. Section 3, paragraph (1) provides:

"Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Ex Parte 175 and in the three other ex parte horizontal percentage increase cases since the second World War, the Interstate Commerce Commission has allowed the railroads to increase all interstate rates by flat percentages with only very restrictive exceptions. The result of these orders has been to give undue advantage and preference to the shorthaul shippers and to cause unreasonable prejudice against and disadvantage to longhaul shippers. The reason for this is obvious. The longhaul rates already being higher, the percentage increase applied to these rates results in a greater increase in dollars and cents than in the case of the shorthaul shippers. Shippers who are located farther from the principal markets than their competitors, but who, through economies of management, have been able to produce their product at a price where they can compete with their more favored competitors through absorption of the freight differences, are suddenly faced with material increases in the dollars and cents difference between their freight bill and that of their competitors. In the ex parte increase cases, the Interstate Commerce Commission gave no thought to whether or not the horizontal increases were pricing established industries out of their markets. They gave no consideration to whether or not this order resulted in violation of the above quoted section 3, paragraph 1 of the Interstate Commerce Act.

(c) Title 49, U.S.C.A., Sec. 1, paragraph (5) provides in part as follows:

> "Just and reasonable charges required; classification of messages, and rates; exchange of services. All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * * * *"

The ex parte increase cases take no cognizance of whether or not the flat percentage increase results in unjust and unreasonable charges. They merely accentuate and exaggerate any injustice which existed in the rates prior to the increases.

We recognize, of course, that in revenue cases uch as the ex parte cases, the Commission cannot go into a detailed examination of each individual rate on all of the railroads in the country. That would indeed be a mountainous task. The Commission can and should, however, investigate and make appropriate orders in regard to groups or blocks of rates in regard to which flat percentage increases would violate the provisions of the Interstate Commerce Commission Act above set forth.

In its recent order in Ex Parte No. 206, not yet published as a printed report, the Interstate Commerce Commission itself recognized the inequities inherent in percentage horizontal increases. On sheet 77 of that report the Commission stated:

> "We have heretofore suggested that the time has probably come when consideration should be given to ways of increasing rates other than by means of horizontal increases. The carriers should give consideration to this suggestion."

There can be no question but that the Interstate Commerce Commission in Ex Parte No. 175 was attempting to impose a hard and fast standard for increases on the nation's railroad rates countrywide, interstate as well as intrastate. In its report in this case, the Commission stated (R. 117):

> "The Ex Parte No. 175 increases were authorized for interstate rail traffic through the country based upon the general needs of the railroads generally and have been made effective on interstate traffic generally as well as upon intrastate traffic within most of the states."

In other words the Commission is stating in effect that they granted the Ex Parte 175 increases on interstate rates on the assumption that the same increase was required on intrastate rates in all states. The Interstate Commerce Commission pre-judged the intrastate levels in every state in its Order in Ex Parte 175. The evidence in that case indicated clearly that the revenue needs of the roads in the various sections of the country were not the same. This difference was recognized by the Commission in its second Ex Parte 175 order in which a greater increase was granted to the eastern roads than the western roads. However in the final order, this difference was washed out. We are not alone in our opposition to this procedure of lumping all the roads in the country in one basket and deciding the rates of all on the basis of the revenue needs of the poorest of the railroads. Commissioner Aitcheson in dissenting from the Ex Parte 175 order in a dissent which was concurred in by Commissioners Mahaffie and Splawn stated:

> "I concur generally in the foregoing report but cannot agree that the revenue needs of the petitioning railroads in the three rate territories are so equal as to warrant a uniform nationwide increase in rates. The revenue needs of the railroads in the eastern district

are greater than in the southern or western districts as the report makes entirely clear. This difference in financal conditions should be recognized by the commission." (284 I.C.C. 589).

Now the Interstate Commerce Commission proposes to go one step further. In addition to applying a uniform increase in interstate rates, where it does have jurisdiction, on the basis of the requirements of the poorest roads, it proposes to impose the same straight-jacket on intrastate rates where it may take jurisdiction only under very restricted circumstances. It proposes in effect to measure increases on Utah intrastate rates by the revenue needs of the New York Central, the Pennsylvania and the New Haven railroads. This we submit it cannot do. Under the provisions of 49 U.S.C. 13 (4) Utah intrastate rates must be measured by the Utah intrastate operation of the railroads.

State Authority v. Federal Authority

This court in many decisions, some of which are cited above, has upheld the power of the states to regulate intrastate rates. As the Court held in the case of North Carolina v. United States, 325 U.S. 507; 89 L. ed. 1760, before the Commission can nullify a state rate, jurisdiction for the exercise of federal power must clearly appear. If the order in this case is to be upheld, then the standards set forth in the North Carolina case must be disregarded. If this order is to be upheld, it must be on the basis of unwarranted presumptions which would effectively relieve the states of their power to regulate intrastate rates in any case. This position is clearly set forth in the dissenting opinion of Judge Christenson, in the following language:

"Three unwarranted assumptions would seem necessary to logically sustain the decision of the Commis-

sion. One would be that prior to the application of the 15% increase nationwide, intrastate and interstate rates in Utah were in balance with reference to the cost-revenue factor so that each furnished its fair share of the total revenue needs. If this presumption could be applied in the absence of evidence in the record to support it, or in view of the kind of evidence before us, the making of a rate case would be exceedingly simple, i.e. (a) the rates, intrastate and interstate in Utah prior to the application of the nationwide increase affecting interstate commerce provided in Ex Parte 175 were reasonably in balance; (b) interstate rates have been increased 15%, and thus, intrastate rates are out of line by this percentage; (c) by increasing intrastate rates 15% the two classes are restored to balance so that each furnishes its fair share of general revenue requirements.

"Another presumption would have to be indulged: that between the time of the last simultaneous increase, or at least subsequent to the increase under Ex Parte 175, no new factors affecting costs have developed to throw the presumed balance out. The basis of this is furnished, if at all, by the testimony concerning the intermingling of interstate and intrastate traffic, which, as has been pointed out, is insufficient.

"And there is another assumption that is required if the deficiencies are to be avoided. On the whole record it appears without dispute that there are different factors operating in progressive measure to influence intrastate rates as distinguished from rates interstate from the standpoint of the revenue-cost ratio. The rapid development of the industrial and mining economy of Utah in relation to the nation as a whole, and its established incidents, including increasing traffic density, underscore the dissimilar conditions. No evidence to disprove this divergence nor to define, limit or measure its effect appears. The Commission in its report, however, as above pointed out, dismisses the significance of these factors and other studies directly measuring the differences, not on the basis of any op-

posing studies or evaluations introduced at the hearing but, for example, in one instance by a general conclusion as to comparative unit costs finding no support in the evidence, and in another instance by referring to its determination in an entirely different case.

"May it be assumed, without evidence in the record which would furnish a rational basis in and of itself, that as an agency presumably equipped or informed by experience to deal with a specialized field of knowledge, its conclusions are valid and unassailable here? If this be so, the pattern for virtually automatic application of nation-wide rate increases to intrastate commerce would be complete."

If these presumptions are justified in this case they are justified in every case. Therefore, in all cases of interstate increases, as quickly as the Interstate Commerce Commission determines that an overall need exists for increased revenue for the railroads, an inflexible pattern based upon presumption and matters of common knowledge would force the intrastate rates to adopt the same percentage rate of increase as interstate rates. Hearings before State Commissions or Section 13 hearings before the Interstate Commerce Commission would become mere sham proceedings, leading inexorably to a preordanied conclusion. If such is the law it should be clearly established in this case so that state regulatory bodies may be aware that they have no power to pass upon intrastate rates. Counsel wishes to urge upon this court that if the decision of the Interstate Commerce Commission is to be sustained, it be sustained upon this basis of presumption and matters of common knowledge, and not upon the fiction that substantial evidence exists where obviously none does.

H

CONCLUSION

Counsel urges upon this court that the dissenting opinion of Judge Christenson correctly analyzes the evidence in this case and properly applies the law to that evidence. The railroads failed to meet the formula set down in the King case in that they did not prove by any evidence that conditions under which interstate and intrastate traffic move are substantially the same with respect to all factors bearing on the reasonableness of the rate. The basis for Interstate Commerce Commission jurisdiction under 49 U.S.C.A. 13 (3) (4) therefore did not exist. The holding of the trial court should be reversed and the order of the Interstate Commerce Commission in this matter should be vacated and the application of the increased intrastate rates enjoined.

Respectfully submitted,

CALVIN L. RAMPTON
Counsel of Record for Appellants
721 *Cont'l Bank Bldg.*
Salt Lake City, Utah

E. R. CALLISTER
Attorney General of Utah

RAYMOND W. GEE
Ass't Attorney General

KEITH SOHM
Commerce Attorney for the Utah Public Service Commission
Attorneys for Appellant, Public Service Commission of Utah
State Capitol
Salt Lake City, Utah

PROOF OF SERVICE

I, CALVIN L. RAMPTON, counsel of record for appellants, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of October, 1957, I served, on behalf of the appellants herein, copies of the foregoing Appellants' Brief, as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington, D.C.

2. On the Interstate Commerce Commission, by mailing a copy in an addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charles H. Johnson, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

Bryan P. Leverich, Esq.
A. U. Miner, Esq.
Attorneys for Union Pacific Railroad Company
Union Pacific Bldg.
Salt Lake City, Utah

S. N. Cornwall, Esq.
Attorney for Denver and Rio Grande Western Railroad Company
Walker Bank Bldg.
Salt Lake City, Utah

A. H. Nebeker, Esq.
Attorney for Southern Pacific Company
Kearns Bldg.

Peter W. Billings, Esq.
Attorney for Western Pacific Railroad
Cont'l Bank Bldg.
Salt Lake City, Utah

John H. Snow, Esq.
Attorney for Bamberger Railroad Company
Walker Bank Bldg.
Salt Lake City, Utah

W. H. Fitzpatrick, Esq.
Attorney for Union Pacific Railroad Company
Union Pacific Railroad
Omaha, Nebraska

A. U. Miner, Esq.
Attorney for Ogden Union Railway & Depot Company
Salt Lake-Garfield and Western Railroad Company
Tooele Valley Railway Company and Utah Railway Company
Union Pacific Building
Salt Lake City, Utah

CALVIN L. RAMPTON
Counsel of Record for Appellants